IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 958 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DILAWARKHAN BALDARKHA PATHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 958 of 1996

MR MJ BUDDHBHATTI for Appellant

MR ND GOHIL, APP, for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 24/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374 of the Code of Criminal Procedure, 1973, is directed against judgment dated August 27, 1996, rendered by the learned Additional Sessions Judge, Surat, in Sessions Case No.279 of 1995, by which the appellant is convicted of the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer R.I. for life and fine of Rs.2000/-, in default, R.I. for six months.

2. Satnam Totaram, who is complainant in the case, is running a firm in the name of "Rachana Text" on 2nd floor of Mulchand Market located in City of Surat. He had employed Dipak Shantilal Rana. The incident in question had taken place on September 9, 1995. On the day of incident, Satnam Totaram had handed over a parcel of saries to be delivered to Jindal Textile located in Ratan Chambers. Deepak Shantilal had tied the parcel on bicycle and had proceeded towards Ratan Chambers to effect the delivery. After handing over the parcel to be delivered, to Deepak, Satnam had gone to his residence. One Bajrangbhai is residing near the house of Satnam and a telephone was installed at the residence of Bajrangbhai. Sometime after Satnam had reached his residence, Bajrangbhai had called out his name and informed that there was a message on telephone for him. Satnam had accordingly gone to the house of Bajrangbhai to receive the message. The person, who was telephoning, had not disclosed his name, but informed Satnam that Deepak was killed by means of a knife. Satnam was also informed that the caller was able to ascertain that the deceased was employed by Satnam on the basis of a bill which was found from the pocket of the deceased. Satnam was also informed that bicycle and parcel containing saries were lying near India Market. On receiving the information, Satnam had gone to the place indicated by the caller and found that Deepak was lying in a bleeding condition and was dead; whereas the cycle and the parcel were lying at a distance from the place where the deceased was lying. Having ascertained state of affairs at the place of incident, Satnam Totaram had lodged complaint with the police at about 20.15 hours. After registration of the offence, the complaint was handed over for investigation to P.S.I. Babulal Maganlal Goya of Salabatpura Police Station, Surat. During the course of investigation, it transpired that the incident in question was witnessed by Ramsevak Parasram, who was employed as a watchman at Ashirwad Market. Therefore, his statement was recorded. The statements of other

witnesses conversant with the facts of the case were also recorded. The investigating officer had made necessary arrangement for sending dead body to Civil Hospital, Surat for postmortem examination. Postmortem on the dead body of the deceased was conducted by a panel of doctors. Ultimately, the appellant was arrested on 11.9.1995 and blood stained clothes put on by him were seized. Further, the knife used by the appellant in the incident was discovered pursuant to information given by the appellant while in custody. The knife was also found to be blood stained. The incriminating articles seized were sent to Forensic Science Laboratory for analysis and report of the analyst was obtained. On conclusion of investigation, the appellant was chargesheeted in the Court of learned J.M.F.C. Surat, of the offences punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. As the offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Surat for trial where it was numbered as Sessions Case No.279 of 1995.

3. The learned Additional Sessions Judge, Surat, to whom the case was made over for trial, had framed charge against the appellant at Exh.2, of the offences punishable under Section 302 I.P.C. and Section 135 of the Bombay Police Act. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (1) Dr.Rakesh Narendra Tandon, PW.1 at Exh.7, (2) Ramsevak Parasram, PW.2 at Exh.18, (3) Deepakkumar Hasmukhlal, PW.3 at Exh.19, (4) Balvantrai Bhukhandas Asmani, PW.4 at Exh.20, (5) Satnam Totaram, PW.5 at Exh.24, (6) Nareshkumar Thakordas Jarivala, PW.6 at Exh.28, (7) Raja Abdul Kadar Zilitvala, PW.7 at Exh.30, (8) Babulal Maganlal Goya, PW.8 at Exh.32, (9)Shantilal Sukhlal, PW.9 at Exh.34, (10) Pravinchandra Nanabhai Gheevala, PW.10 at Exh.35, (11) Niranjan Karamchand Vidhani, PW.11 at Exh.36, and (12) Chandrashekhar Madik Mudaliyar, PW.12 at Exh.37, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as, postmortem notes at Exh.8, inquest report at Exh.10, panchnama of place of occurrence at Exh.11, map of scene of offence at Exh.12, notification issued by the competent authority under Section 37 of the Bombay Police Act at Exh.14, report of analysis at Exh.16, panchnama of identification parade at Exh.23, complaint of Satnam at Exh.25, necessary entries from diary maintained at the police station at Exh.26, arrest panchnama of the appellant at Exh.29, panchnama indicating discovery of knife pursuant to information

given by the appellant while in custody at Exh.31 etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant, the circumstances appearing against him in the evidence of prosecution witnesses and recorded his statement as required by Section 313 of the Code of Criminal Procedure. The defence pleaded by the appellant in his further statement was that he was innocent and was falsely involved in the case. However, the appellant had neither examined himself on oath nor any witness to substantiate the defence pleaded in his further statement.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Deepak Shantilal had died a homicidal death. The learned Judge found that testimony of Ramsevak Parasram was reliable which established that the appellant was author of injuries sustained by deceased Deepak and that the testimony of witness Ramsevak was corroborated by the evidence of witness Deepakkumar Hasmukhlal as well as that of Satnam Totaram. In view of the said conclusion, the learned Judge held that it was established by the prosecution that the appellant had caused injuries with knife to the deceased with intention to kill him and was, therefore, liable to be convicted of the offence punishable under Section 302 I.P.C. According to the learned Judge, the appellant had also committed offence punishable under Section 135 of the Bombay Police Act, but as he was liable to be convicted under Section 302 I.P.C. wherein minimum punishment prescribed is R.I. for life, it was not necessary to convict the appellant separately of the offence punishable under Section 135 of the Bombay Police Act. In view of the abovereferredto conclusions, the learned Judge has convicted the appellant of the offence punishable under Section 302 I.P.C. and imposed sentence referredto above, by judgment dated August 27, 1996, giving rise to instant appeal.

6. Mr.M.J.Budhbhatti, learned senior counsel of the appellant, contended that witness Ramsevak Parasram had no opportunity to identify the appellant as assailant of the deceased and as evidence led by the prosecution regarding identification parade is not trustworthy, the appellant should be acquitted by giving benefit of reasonable doubt. According to the learned counsel of the appellant, though the incident had taken place on

main road and residential houses are situated nearby, no person residing in the nearby house was examined by the prosecution and, therefore, after drawing an adverse inference against the prosecution, the appellant should have been acquitted. What was maintained was that witness Ramsevak Totaram had no opportunity to identify the appellant as assailant of the deceased and, therefore, the learned Judge of the trial Court was not justified in placing reliance on his testimony for the purpose of convicting the appellant under Section 302 I.P.C. It was also argued that the evidence of witness Deepakkumar Hasmukhlal would indicate that he had seen a person with knife whose name was Dilavarkhan; whereas the name of the appellant is Dildarkhan and as the appellant was never identified either by witness Ramsevak or by witness Deepakkumar as assailant of the deceased, the appeal should be allowed. In the alternative, it was argued that the death of the deceased was caused without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel, which is quite evident from the testimony of witness Ramsevak and as the appellant had not taken undue advantage of the situation or acted in a cruel or unusual manner, the appellant would be liable to be convicted under Section 304 Part-I of I.P.C., but not under Section 302 I.P.C. and, therefore, conviction of the appellant should be converted into one punishable under Section 304 Part-I of I.P.C. In support of submissions advanced at the Bar, the learned counsel has placed reliance on the decisions in (1) Joseph v. State of Kerala, AIR 2003 SC 507, (2) Lallu Manjhi and another v. State of Jharkhand, AIR 2003 SC 854, and (3) Lakhwinder Singh & Ors. v. State of Punjab, AIR 2003 SC 2577.

7. Mr.N.D.Gohil, learned A.P.P., contended that the testimony of witness Ramsevak establishes beyond reasonable doubt that the appellant after inflicting knife blows to the deceased had run away, but was chased by witness Ramsevak and, therefore, the claim of witness Ramsevak that he had identified the appellant as assailant of the deceased deserves acceptance. It was argued that not only witness Ramsevak had identified the appellant while the appellant was trying to flee the place of incident, but the appellant was properly identified by him at identification parade held by the then Executive Magistrate Mr.Balvantrai Bhukhandas Asmani and, therefore, it is not correct to contend that identification of the appellant as assailant is in doubt. It was argued by the learned counsel of the State Government that the omissions and/or improvements appearing in the evidence of prosecution witnesses are

not material at all and the prosecution case is not liable to be thrown over board merely because there are some minor omissions or improvements in the evidence of the witnesses. According to the learned A.P.P., the circumstantial evidence, namely, that blood-stained knife was discovered pursuant to information given by the appellant while in police custody and find of blood on the knife and the clothes put on by the appellant having same blood group as that of the deceased, would establish that the appellant was quite near when the deceased was fatally wounded and, therefore, well-founded conviction of the appellant under Section 302 I.P.C. should not be interfered with by this Court in instant appeal. It was emphasised that the witnesses have narrated the incident in natural manner which has inspired confidence of the trial Court which had advantage of observing demeanour of the witnesses and as the learned counsel of the appellant has failed to dislodge the grounds assigned by the learned Judge for convicting the appellant of the offence punishable under Section 302 I.P.C., the appeal should be dismissed. With reference to alternative plea urged by the learned counsel of the appellant, it was argued that the evidence on record establishes that the appellant had acted in a cruel manner while causing death of the deceased and, therefore, conviction of the appellant should not be altered to one under Section 304 Part-I of the Indian Penal Code as is urged by the learned counsel of the appellant.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The fact that deceased Deepak Shantilal had died a homicidal death is not in dispute. The testimony of witness Satnam Totaram would show that he had found the deceased lying in dead condition on road in a bleeding condition. The evidence of P.S.I. Mr.Goya would show that dead body of the deceased was sent to Civil Hospital, Surat for postmortem examination. The testimony of Dr.Rakesh Tandon PW.1 Exh.7 establishes that autopsy on the dead body of the deceased was performed by a panel of doctors. The doctor in his substantive evidence before the Court has enumerated in detail the injuries sustained by the deceased. According to the doctor, the deceased sustained in all, 9 injuries. Internal injuries sustained by the deceased were also noticed while performing autopsy on the dead body. The evidence of the doctor stands fully corroborated by the contents of contemporary document viz. postmortem notes produced on the record of the case at Exh.8. As mentioned in the

postmortem notes, cause of death of the deceased was shock and haemorrhage following stab injuries on chest and abdomen and damage to internal organs. It is not the case of any one that injuries sustained by the deceased were either suicidal or accidental. Under the circumstances, the finding recorded by the learned Judge of the trial Court that the deceased had died a homicidal death is found to be eminently just and is hereby upheld.

9. The plea that the appellant was not identified by the witnesses as assailant of the deceased and, therefore, he should be acquitted, cannot be accepted. The testimony of witness Ramsevak Parasram recorded at Exh.18 shows that he was discharging duties as watchman at Ashirvad Market. According to him, his attention was drawn to the incident in question when he had heard shrieks of the deceased. What is maintained by him before the Court is that he had seen the incident at a distance of 35 ft. from Ashirvad Market with the help of light emanating from a tube-light. It is asserted by the said witness that he had chased the person who was assaulting the deceased with knife and had also hit two blows with thick-stick on his neck and that he was bleeding from neck, but he was not able to apprehend the assailant. According to this witness, the person who had assaulted the deceased, was tall but slim and had put on yellow coloured shirt having design and black pant. It was also asserted by the witness that he had identified the appellant as assailant of the deceased at identification parade which was held on October 4, 1995. During his cross-examination it was mentioned by the witness that he had not seen the place where identification parade was held and that he had reached the said place after making inquiry at Salabatpura Police Station. It was also mentioned by this witness in his cross-examination that he had learnt that the appellant was arrested on the next day of the incident and that he had identified the appellant as assailant of the deceased when the appellant was in police custody. It was also mentioned by the witness that he was shown the clothes belonging to the appellant, which were identified by him. What was stated by the witness in his cross-examination was that an altercation and scuffle had taken place between the appellant and the deceased before knife blows were given by the appellant. It was asserted by him that he had chased the appellant for five minutes, but others had not helped him in apprehending the appellant. It was also mentioned by the witness that when he was chasing the appellant, he was facing back of the appellant, but had opportunity to see the face of the appellant, as the appellant was looking back when he was being chased. The

suggestion made by the defence that he was deposing falsely against the appellant was emphatically denied by him. This is all what transpires from the testimony of witness Ramsevak. Though this witness has asserted that he had given two blows with thick-stick on the neck of the appellant while chasing him and that the appellant was bleeding from neck, the arrest panchnama does not show that the appellant had sustained any injury on his neck. However, this assertion will have to be regarded as embellishments made by the witness, a defect from which no testimony is free. However, the fact that he had heard altercation and witnessed scuffle between the appellant and the deceased, inspires confidence of the Court. The assertion made by this witness that he had opportunity of looking at the face of the appellant at the time when he was chasing the appellant, as the appellant was looking back, deserves acceptance. As such there are no major contradictions or omissions in his testimony. It could not be suggested by the defence to this witness that he was on inimical terms with the appellant. In fact, prior to the incident, the witness was not knowing the appellant at all and, therefore, had no reason at all to implicate the appellant falsely in such a serious case. His evidence would further indicate that he was able to identify the appellant as assailant of the deceased at identification parade which was held by the Executive Magistrate on October 4, 1995. The evidence of witness Asmani shows that identification parade was held by him on October 4, 1995 and that out of 8 persons, the witness had correctly identified the appellant. The testimony of Executive Magistrate Mr.Asmani gets support from contemporary document viz. panchnama of identification parade produced on the record of the case at Exh.23. If witness Ramsevak had no opportunity of identifying the appellant as assailant of the deceased after the incident, he would not have been able to identify the appellant during the course of holding of identification parade. Thus, the identification of the appellant as assailant of the deceased by witness Ramsevak inspires confidence of this Court. Further, testimony of witness Ramsevak also gets corroboration from the evidence of witness Deepakkumar Hasmukhlal examined at Exh.19. Witness Deepakkumar has stated that the incident in question had taken place on September 9, 1995 between 8.30 P.M. and 9.00 P.M. and that he had identified the appellant as the person who was running away with knife and that the watchman was chasing him. Though the name of the appellant is Dildarkhan and witness Deepakkumar has stated that the name of the person who was being chased by the watchman was Dilavarkhan, there is no manner of doubt that some

genuine mistake about the name of the appellant is committed by the witness, but the witness had not committed any error in identifying the appellant as the person who was running away with knife in his hand and who was being chased by the watchman. It may be mentioned that even the learned Judge in Para 8 of the impugned judgment has referred the appellant as Dilavarkhan. Even in the cause title of memorandum of appeal and its body, the appellant has referred to himself as Dilwarkhan and not as Dildarkhan. However, the discrepancy in the name of the appellant is of little consequence, more particularly when his identification as assailant of the deceased by the witness inspires confidence of the Court. Witness Deepakkumar in his examination-in-chief, after identifying the appellant as assailant of the deceased in the Court room, has asserted that the appellant had run away towards ring-road, Surat. In his cross-examination, it is stated by the witness that the place where he had seen the appellant running away with knife was at a distance of 30 to 35 meters from the place where the deceased was lying dead. It was also stated by the witness that he had not made any attempt to take out anything from the pocket of the deceased and that he had stayed near the dead body of the deceased for 2 to 5 minutes after which he had gone home. A fair reading of testimony of witness Deepakkumar shows that he had seen the appellant running away with knife and that the appellant was being chased by the watchman. Though in his examination-in-chief the witness has not given the name of the watchman, there is no manner of doubt that the reference is to witness Ramsevak Parasram. Thus, evidence of witness Ramsevak Parasram gets corroboration in material particulars from the sworn testimony of witness Deepakkumar Hasmukhlal.

10. Further, the testimony of witness Nareshkumar Jarivala would show that the appellant was arrested on September 11, 1995 and panchnama of his person was prepared at the time of effecting his arrest. Though witness Ramsevak had stated that the appellant was arrested on September 10, 1995, his assertion does not get support from the testimony of witness Nareshkumar Jarivala and testimony of investigating officer. The testimony of witness Nareshkumar gets corroboration from the contents of arrest panchnama produced on the record of the case at Exh.29. The evidence of witness Nareshkumar and police officials as well as other record of the case establishes beyond reasonable doubt that the appellant was arrested on September 11, 1995 and not on September 10, 1995 as is stated by witness Ramsevak. The evidence of witness Nareshkumar would show that the

clothes, meaning thereby shirt and pant put on by the appellant, which were seized in presence of panch witnesses, were found to be blood-stained. Further, the evidence of witness Raja Abdul Kadar Zilitvala, PW.7 Exh.30 establishes that blood-stained knife was discovered pursuant to information given by the appellant while he was in police custody. The testimony of witness Raja Abdul Kadar Zilitvala gets corroboration from the contents of panchnama produced at Exh.31 as well as by the evidence of police officer. The evidence of witness Raja Abdul Kadar read with the contents of panchnama Exh.31 proves it beyond reasonable doubt that the knife discovered at the instance of the appellant was also blood-stained. The investigating officer had sent the incriminating articles to Forensic Science Laboratory for analysis. The report of the analysis is produced by the prosecution at Exh.16. The report shows that the knife discovered at the instance of the appellant as well as clothes put on by the appellant were blood-stained and the blood was ascertained to be of 'AB group' which was the blood group of the deceased. The discovery of blood of the same group on the weapon of offence and on the clothes of the appellant indicates that the appellant was in close proximity of the deceased when the deceased was fatally wounded. The incriminating circumstance, namely, find of same blood group on the weapon of offence and on the clothes of the appellant was explained to the appellant and his explanation was sought for. However, no explanation could be offered by the appellant as to how blood having the same group as that of the deceased was found on the weapon of offence and on his clothes. This is also a circumstance which lends corroboration to the testimony of witness Raja Abdul Kadar and witness Deepakkumar. On reappreciation of evidence, this Court finds that the finding recorded by the learned Judge that the appellant was author of the injuries sustained by the deceased is well-founded and no ground is made out by the learned counsel of the appellant to interfere with the same in instant appeal. The decisions cited at the Bar by the learned counsel of the appellant turn on their own facts and the principles laid down therein are not applicable to the facts of the present case. Hence, detailed discussion of the same is avoided.

11. This brings the Court to consideration of the question as to which offence is committed by the appellant. The evidence of witness Ramsevak establishes that he himself had heard altercation which had taken place between the appellant and the deceased and had also seen scuffle between the appellant and the deceased. This is quite evident from the admission made by the

witness in his cross-examination. The evidence on record does not establish that the appellant was knowing the deceased prior to the incident, or that the deceased was knowing the appellant. It is relevant to notice that in charge Exh.2 it was mentioned that the cycle of the deceased had collided with the appellant, as a result of which, altercation had taken place and that the deceased had caught hold of the appellant, as a result of which the appellant was annoyed as well as excited and had given knife blows to the deceased. The relevant facts in the charge must have been mentioned on the basis of papers of the chargesheet. However, no evidence was led by the prosecution to establish the fact that the cycle of the deceased had collided with the appellant or that the deceased had caught hold of the appellant and in excitement the appellant had given blows to the deceased. However, the statement made by witness Ramsevak to the effect that he himself had heard altercation which had taken place between the appellant and the deceased and had also seen scuffle between the appellant and the deceased, creates doubt about the genesis of the incident, as is sought to be projected by the prosecution. The fact that the deceased was on bicycle is stated by witness Satnam Totaram with whom the deceased was employed and who had reached the scene of offence within no time. However, the case which was mentioned in the charge, was given a complete go-by and the Court feels that something was suppressed by the prosecution in order to see that the appellant was convicted of the offence punishable under Section 302 I.P.C. and was not able to get benefit of any of the Exceptions provided in Section 300 of the Indian Penal Code. Even if one comes to the conclusion that nothing was suppressed by the prosecution, there is no manner of doubt that an altercation as well as scuffle had taken place between the appellant and the deceased, who were completely unknown to each other. Exception-4 to Section 300 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. It is not the case of any witness that the appellant had committed murder of the deceased with premeditation. There is no manner of doubt that there was a sudden fight between the deceased and the appellant in the heat of passion upon a sudden quarrel. Though the medical evidence shows that the deceased had sustained 9 injuries, it is difficult to conclude that the appellant had taken undue advantage of the situation and acted in cruel and unusual manner. On the facts and in the circumstances of the case, this Court is of the

opinion that the case on hand would be governed by Exception-4 to Section 300 I.P.C. and it will have to be held that the appellant would not be liable to be convicted under Section 302 I.P.C. Section 304 Part-I of I.P.C. provides that whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death. The medical evidence on record read with that of witness Ramsevak and witness Deepakkumar would show that the appellant had caused such bodily injuries to the deceased as were likely to cause his death and, therefore, the appellant would be liable to be convicted of the offence punishable under Section 304 Part-I of I.P.C. Thus, the conviction of the appellant deserves to be converted from one under section 302 I.P.C. to one under Section 304 Part-I of I.P.C.

12. This Court has heard the learned counsel of the appellant and the learned Additional Public Prosecutor regarding sentence to be imposed on the appellant for the offence punishable under Section 304 Part-I of I.P.C. Having considered their submissions, this Court is of the opinion that interest of justice would be served if the appellant is sentenced to R.I. for ten years and fine of Rs.2000/-, in default, R.I. for six months for commission of offence punishable under Section 304 Part-I of I.P.C.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant under Section 302 I.P.C. and sentence imposed by the trial Court on the appellant for commission of the said offence vide judgment dated August 27, 1996 rendered in Sessions Case No.279 of 1995 is hereby set aside. Instead, the appellant is convicted of the offence punishable under Section 304 Part-I of I.P.C. and sentenced to suffer R.I. for ten years and fine of Rs.2000/-, in default, R.I. for six months. The competent jail authority is directed to ascertain whether appellant i.e. Dildarkhan Baldarkhan Pathan has undergone the sentence imposed by this Court in instant appeal. If it is found that the appellant has undergone the sentence imposed by this Court, he shall be set at liberty forthwith, unless his presence is needed with reference to any other case. Muddamal to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(D.P.Buch, J.)

(patel)